SUPREME COURT, U. S.

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No. 1159

In the Supreme Court of the United States

OCTOBER TERM, 1967

SOUTHERN PACIFIC COMPANY, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

MOTION TO AFFIRM

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Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission jointly move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a district court decision (J.S. App. 1a-31a; 277 F. Supp. 671) sustaining the report and order of the Interstate Commerce Commission ending certain preferential arrangements between the Southern Pacific Company

and the Union Pacific Railroad Company, and affording equal competitive opportunities to other connecting railroads which provide service over the central transcontinental routes—specifically, the Denver & Rio Grande Western Railroad Company and the Western Pacific Railroad Company, which are the other appellees here.

The present case has its origins over a century ago when, there being no rail lines west of the Missouri River, the Congress authorized and largely financed the construction of the first transcontinental railroad. Act of July 1, 1862, 12 Stat. 489; Act of July 2, 1864, 13 Stat. 356 (Pacific Railroad Acts). The line, to parallel the 42nd meridian between San Francisco and Omaha, was to be built by two companies, the Central Pacific from the west and the Union Pacific from the east, and their meeting at Promontory Point, Utah, in 1869 is legendary.

Within the next 50 years several competing rail routes to the Pacific coast were completed. They were controlled and monopolized by certain interests until the enactment of the antitrust laws; thereafter, that monopoly was gradually dismembered pursuant to landmark decisions of this Court. *Northern Securities Co.* v. *United States*, 193 U.S. 197; *United States* v. *Union Pac. R. Co.*, 226 U.S. 61; *United States* v. *Southern Pac. Co.*, 259 U.S. 214.

In 1922, this Court ordered the Southern Pacific to divest itself of its control of the Central Pacific, finding that "the policy of the Southern Pacific system has been to favor transportation on its line by securing for itself, whenever practicable, the carriage

of freight which would normally move eastward or westward over the shorter line of the Central Pacific Railroad and its connections, for its own much longer and wholly-owned southern route" (*United States* v. *Southern Pac. Co.*, *supra*, 259 U. S. at 231).[1]

While that case was pending, Congress had enacted the Transportation Act of 1920. Among other things, that Act provided that Interstate Commerce Commission approval of a railroad consolidation could exempt it from the antitrust laws (49 U.S.C. 5(11)). Availing itself of this new provision, the Southern Pacific promptly applied to the Commission for permission to retain control of the Central Pacific, and the Commission granted it, subject to conditions to prevent abuses such as had been described by this Court. *Control of Central Pacific by Southern Pacific*, 76 I.C.C. 508. To that end, condition (e) of the 1923 Commission order approving the acquisition obliged the Southern Pacific preferentially to solicit traffic over the Central Pacific-Union Pacific route (76 I.C.C. at 530); that is, in the defined territory the Southern Pacific was to use its best efforts to have traffic routed via the Central Pacific-Union Pacific route to and from the midwest, rather than via its own longer, southern transcontinental route. By condition (i), the Commission expressly reserved the power to reopen the proceeding to make "such orders as the Commission may deem necessary or appropriate supplementary to the present order" (76 I.C.C. at 531).

[1] The location of the lines of the various railroads which provide transcontinental service over central routes are shown on the map at J.S. App. 33a.

The Rio Grande, a party to the proceeding, offered no objection to the Commission's authorization of the control relationship, as conditioned (76 I.C.C. at 522).

Thereafter, in 1924, the Southern Pacific and the Union Pacific entered into a private agreement which established a preferential relationship far beyond the terms of condition (e), which provided for preferential solicitation by the Southern Pacific for the Union Pacific. The 1924 agreement also obliged the Union Pacific preferentially to solicit traffic for Southern Pacific, required each railroad to route all unrouted traffic over the lines of the other, and enlarged the geographic area embraced by condition (e). That agreement was never approved by the Commission.

In 1957 the Rio Grande filed with the Commission a petition seeking reopening of the *Control* case and modification of condition (e) so as to eliminate the discrimination in favor of the Union Pacific and to place it on an equal basis in competing for Southern Pacific-originated traffic moving over the central transcontinental rail routes. Noting that it had acquiesced in the conditions when they were imposed in 1923, the Rio Grande alleged that competitive conditions over the intervening 34 years had drastically changed and that condition (e) was no longer just and reasonable. By a subsequent amendment to its petition, Rio Grande further asserted the unlawfulness of the 1924 private agreement and the practices of the parties thereunder.

In its final decision,[2] the Commission found "that

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[2] In its first decision (317 I.C.C. 469), the Commission had held that the legality of the 1924 agreement and the practices

the present effect of the discriminatory practices against the Rio Grande in the preferential solicitation and routing of traffic results in a stifling of competition between the Union Pacific and the Rio Grande on Transcontinental traffic" (328 I.C.C. at 356). The Commission ordered that condition (e) "be modified by striking therefrom the name of Union Pacific as the only connection of Southern Pacific on traffic moving via Ogden" (328 I.C.C. at 357)—thus placing the Rio Grande in an equal competitive position with the Union Pacific, while still protecting the Ogden route from discrimination in favor of the Southern Pacific. Noting that the preferential routing agreement and Union Pacific's reciprocal obligation of preferential solicitation had never been authorized by condition (e), the Commission further held that such discriminatory practices "are contrary to the national transportation policy" and, in the case of preferential routing, in violation of "the plain meaning of Section 3(4)" of the Interstate Commerce Act (328 I.C.C. at 357-358).

On appeal a majority of the statutory three-judge court sustained the decision, finding that the Commission had ample regulatory authority to modify

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of the parties thereunder must be raised in a separate complaint proceeding, and ruled only that condition (e) had not been shown to be unjust or unreasonable as a matter of law. Reversing that decision, the United States District Court for the District of Colorado concluded that "the conditions and the agreement are in reality but two aspects of the same matter," and directed the Commission to consider the matter as "one general issue." *Denver & Rio Grande Western R. Co. v. United States,* 229 F. Supp. 249, 253-254.

condition (e) where it had been demonstrated that the condition was "no longer 'just and reasonable' nor in accord with the 'public interest' " (J.S. App. 22a), and that there was no statutory justification "for the plaintiffs' discriminatory routing and solicitation agreement or practices, or for the retention of the original condition" (J.S. App. 31a).

ARGUMENT

The Commission acted plainly within its discretion in outlawing the discriminatory practices of the Southern Pacific and the Union Pacific, and there is no issue warranting plenary consideration by this Court.

1. The Commission clearly had jurisdiction to modify condition (e) so as to place the Rio Grande in an equal competitive position with the Union Pacific. "[T]he power to retain jurisdiction for the purpose of making modifications that it finds necessary in the light of subsequent circumstances" (*Baltimore & O. R. Co.* v. *United States*, 386 U.S. 372, 387) was expressly exercised by the Commission in condition (i) of the order authorizing Southern Pacific's control of the Central Pacific in 1923, and the record clearly supports its finding that, under present circumstances, the discriminatory treatment of the Rio Grande is no longer just and reasonable.

Appellants' argument is based solely upon an overly technical construction of the phraseology used in condition (i), which would defeat the clear intention of that provision. The reservation of jurisdiction to reopen the proceeding "at any time" to make "such

orders as the Commission may deem necessary or appropriate supplementary to the present order" (76 I.C.C. at 531) clearly contemplated modification of the terms and conditions of the order in light of future changes in circumstances. Appellants' construction of condition (i) as authorizing only supplementary orders which do not result in modification of the prior terms and conditions is unwarranted, and would "illogically bind our national transportation system to archaic philosophies beneficial only for conditions of the past, but detrimental to the public welfare today" (J.S. App. 6a).[3]

Finally, we suggest that appellants' purported distinction between a "modification" and a "supplemental order" is meaningless. Any "supplement" to a prior order must necessarily result in a "modification" of that order, and the phraseology used in a particular case is of no significance.

2. The preferential relationship created by appellants' 1924 private agreement—which was never approved by the Commission—is clearly unlawful. Appellants' preferential routing agreement, which excludes the Rio Grande and the Western Pacific from all traffic not specifically routed by the shipper, is in flagrant violation of the prohibition of Section 3(4) of the Interstate Commerce Act against prejudice to

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[3] Even apart from condition (i), the Commission is empowered by Section 5(9) of the Act to reopen any control proceeding to issue supplemental orders. "If the terms and conditions * * * have now become unjust and unreasonable, a showing to that effect can be made to the Commission for a supplemental order." *City of New Orleans* v. *Texas & N.O. R. Co.*, 195 F. 2d 882, 886 (C.A. 5).

a connecting line in the distribution of unrouted traffic, and contrary to that statute's "manifest purpose to deprive railroads of discretion to apportion economic advantage among competitors at a common interchange" (*Western Pac. R. Co.* v. *United States*, 382 U.S. 237, 244). Both the preferential routing agreement and the Union Pacific's preferential solicitation, which result "in a stifling of competition between the Union Pacific and the Rio Grande on Transcontinental traffic," are "contrary to the public interest and the national transportation policy" (328 I.C.C. at 356).

3. Appellants' discriminatory practices are in no way justified by the Pacific Railroad Acts. While these Acts "prohibit the two named lines from discriminating against each other, they do not require or authorize either the Southern Pacific or the Union Pacific to prefer each other to the point of unduly discriminating against another connecting line such as the Rio Grande and its eastern connections" (328 I.C.C. at 355). Prohibiting "practices of systematic and preconcerted discrimination" *against* each other (*United States* v. *Union Pac. R. Co.*, 226 U.S. 61, 92) is a far cry from authorizing the two railroads to cooperate *with* each other in joint discrimination against other railroads. Such discrimination "contradicts not only the spirit of the acts, but the plain language as well" (J.S. App. 12a).[4]

[4] Appellants are in error in claiming (J.S. 26-28) that the Commission's 1923 *Control* decision indicates a different construction of the Pacific Railroad Acts. On the contrary, the Commission specifically noted in its 1923 decision that "the rights of the Union Pacific and all interests of the public under

Moreover, appellants misconstrue the basic nature of the Pacific Railroad Acts. This legislation was enacted in 1862 and 1864 for the purpose of facilitating the construction and operation of a coast-to-coast rail connection. The insistence upon cooperation between the two lines—the Union Pacific from the East and the Central Pacific from the West—was merely to insure that a smoothly functioning system would not be disrupted by competitive struggles between the two companies. The Acts did not provide for, nor contemplate, the eventual existence of parallel coast-to-coast lines which would enter into direct competition with the Union Pacific-Central Pacific complex. The Pacific Railroad Acts' provision for cooperation along the single (and at that time the only) transcontinental rail connection was adopted solely to safeguard the public interest and convenience; in no sense can it be cited as justification for the type of discrimination involved here.

4. Finally, appellants attempt to rely (J.S. 17-24) upon the fact that in its earlier decision—reversed by the district court—the Commission had expressed the view that condition (e) had not been shown to be unjust and unreasonable as a matter of law. Following the remand, however, the Commission had before it as new evidence the "implications and practices" relating to the 1924 agreement (J.S. App. 19a), the anticompetitive consequences of which it had initially

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the Pacific Railroad acts" (76 I.C.C. at 524) would be protected by conditions (a) through (e)—which did not authorize the preferential routing agreement or Union Pacific's preferential solicitation.

declined to consider.[5] In any event, as the court below emphasized, the Commission's final decision must be judged "by the public interest, rather than by its previous statement," particularly where, "at the time of the remand from the district court, nothing had been finally decided" *(ibid.)*. The reasons and basis for the Commission's unanimous conclusion that appellants' discriminatory practices are unlawful were fully set forth; accordingly, the requirements of the Administrative Procedure Act were amply satisfied. 5 U.S.C. (Supp. II, 1965-66) 557(c); *Minneapolis & St. L. Ry. Co.* v. *United States*, 361 U.S. 173, 192-194; *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515, 531-532.

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[5] Although the record in the two proceedings may have been physically identical, the Commission was charged, by the Colorado district court decision (see note 2, *supra*) which reversed its 1962 decision, with considering the evidence in the record relating to the 1924 agreement and the legality of the practices thereunder—which it had previously not taken into account—in the proceeding on remand (see 328 I.C.C. at 346-347).

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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